Texas Supreme Court Update

by Nick Guinn

Chavez v. Kansas City S. Railway Co.,
(May 26, 2017).

Quick and dirty statement of facts:

- Chavez sued Kansas City Southern Railway and its engineer (the "Railway") for the wrongful death of her husband and son.
- The jury returned a defense verdict. Chavez moved for a new trial, which the court granted. The parties later reached a settlement—as indicated by the signatures of *counsel*. However, at a hearing to approve the agreement, Chavez stated she did not wish to go forward and requested time to find a new law firm.
- The Railway moved to enforce the settlement agreement. Chavez did not appear at the hearing, but her former counsel stated that Chavez had consented to the settlement agreement. The trial court granted the motion and rendered judgment on the settlement.
- Chavez appealed, and the court of appeals reversed and remanded.
- On remand, the Railway filed the settlement agreement, sued for breach, and moved for summary judgment. The

Railway's evidence established Chavez was represented during settlement negotiations but it did not address Chavez's law firm's authority to agree to the settlement. Chavez responded by affidavit that she had not consented to the settlement.
- The trial court granted summary judgment for the Railway.

Appellate procedural posture:
- The court of appeals reversed and remanded entry of the initial judgment as the settlement agreement was not filed of record.
- The court of appeals affirmed the second judgment, stating that it would presume that client authorized an attorney to sign a settlement agreement on the client's behalf.
- The Supreme Court reversed the judgment of the court of appeals and remanded the case to the trial court.

Issues:
- Did defendant establish that plaintiff actually authorized her counsel to enter into a settlement agreement?

Holdings:
- "Assuming without deciding that an attorney retained for litigation is presumed to possess express authority to enter into a settlement agreement on behalf of the client, the presumption may be rebutted with evidence to the contrary. But a summary judgment movant may not use a presumption to shift to the non-movant the burden of

raising a fact issue of rebuttal."

- The Railway was required to provide evidence that Chavez actually authorized her counsel to enter into a settlement agreement on her behalf." "It only produced evidence that Chavez hired counsel to represent her in this litigation and that counsel signed the settlement."

Editorial take:

- When executing a settlement agreement, counsel should obtain the signatures of the parties.

***In re Davenport*,**
(June 16, 2017).

Quick and dirty statement of facts:

- Attorneys Hall and Dietzman (the "Attorneys") executed a contingency fee agreement with client Davenport in partnership dispute with Davenport's former business partners.
- The Agreement states: "It is the purpose of this Agreement to successfully pursue [Davenport's] claim arising out of business dealings with WECO." "In consideration for the present agreement of the Attorneys to represent [Davenport] and the promise to render legal services in the future in pursuit of this claim, [Davenport] agrees to sell, transfer, assign and convey to the Attorneys an undivided interest in the above claim to be calculated as follows:

    - Forty percent (40%) of the gross amount recovered
    - Except that Attorneys will not take a fee out of the ownership of 5 D Water Resources and Dillon Water Services (the Except Clause)."
- The Attorneys won a $70 million jury verdict. Through settlement and other proceedings with Davenport's former partners, Davenport received money and the other partners' interests in the partnership. Davenport paid the Attorneys using the money received. Davenport did not pay the Attorneys for expenses of $226,795.01 or interest in the partnership.
- The Attorneys sued Davenport to recover: part of the ownership interest in the partnership; and the legal expenses in the underlying suit.
- The case went to a jury, which found against the Attorneys on the ownership interest issue. The jury found in favor of the Attorneys with respect to the unpaid expenses. The Attorneys moved for a new trial claiming the Agreement unambiguously entitled the Attorneys to the ownership interest.

Appellate procedural posture:

- The trial court granted a new trial, in part, because the pertinent agreement "unambiguously" permitted the lawyers to recover an ownership interest as attorney fees.
- The court of appeals conditionally granted Davenport's requested mandamus relief and directed the trial court to state its reasons for the new trial.

- The trial court replaced its original order, stating that the Agreement was unambiguous after all. The court of appeals summarily denied Davenport's second petition for writ of mandamus.
- The Supreme Court conditionally granted the petition for writ of mandamus and directed the trial court to vacate its new trial orders and render a final judgment consistent with the opinion.

Issues:

- Whether the trial court abused its discretion in ordering a new trial based on its finding that the Agreement "unambiguously" provides for the recovery of an ownership interest as attorney fees.

Holdings:

- Yes. The trial court abused its disrection because the agreement unambiguously states that the lawyers were *only* entitled to attorney fees from a monetary recovery.
- The dispute turns on questions of contract interpretation.
- The term "sums" in the contract is the crux of the dispute. The Agreement states that the lawyers will receive forty percent (40%) of the gross amount recovered and then later states GROSS AMOUNT represents the total sums recovered. No textual support in the contract indicates "sums" includes an ownership interest.
- Looking to the Except Clause[1], the Attorneys argue that,

[1] *Supra* Quick and dirty statement of facts

by force of negative implication, recovering an ownership interest in businesses other than 5D or Dillon was required under the contingent fee.

- The Court acknowledged that the Except Clause alone does not prohibit a non-monetary recovery for the lawyers, but no basis exists to construe the Except Clause to unambiguously entitle the Attorneys to recover a fee out of other ownership interests.

Editorial take:

- Attorneys should be careful when drafting engagement letters and terms for compensation.
- Attorneys anticipating contingency arrangements should carefully consider what awards or recoveries could be the subject of the contingency and draft accordingly. Of course, ethical considerations arise with respect to interests in a client's business.

Allways Auto Group, Ltd. v. Walters,
(September 29, 2017).

Quick and dirty statement of facts:

- Allways Auto Group provided Heyden a loaner vehicle after the Dodge Caliber he had purchased from Allways had broken down. Heyden had been drinking at the time. Eighteen days later, Heyden drove the loaner into a truck driven by Walters. Heyden was legally intoxicated. Walters

sued Allways for negligent entrustment.

- Heyden did not have a valid driver's license in his possession but presented a photocopy of a prior Illinois license.
- Heyden is an admitted alcoholic with a history of drinking and driving. He was cited for driving while intoxicated in October 2009 in Illinois, where he was living at the time; in February 2012 in Texas, where he had moved; and on August 5, 2012, after losing control of his car and driving into a ditch.
- Because of the August 5 accident, Heyden bought the Caliber sixteen days later and got the loaner vehicle from Allways two days after that. He had surrendered his Illinois driver's license in June 2012 when he received a Texas license, but he had kept a photocopy of the Illinois license. He surrendered his Texas license on August 5 when he refused a breathalyzer. But Allways did not attempt to investigate or inquire into Heyden's criminal record and was not aware of any of his past offenses.

Appellate procedural posture:

- Allways moved for summary judgment, which the trial court granted.
- The court of appeals reversed and remanded, concluding that fact issues regarding proximate cause remained.

Issue:

- Whether "an accident that occurs eighteen days after entrustment" of a loan vehicle to a man who was arguably

intoxicated "is too attenuated to constitute legal cause"?

Holdings:

- "For entrustment to be a proximate cause, the defendant entrustor should be shown to be reasonably able to anticipate that an injury would result as a natural and probable consequence of the entrustment."
- If Heyden were visibly intoxicated when he got the loaner, Allways could have reasonably anticipated he might have a wreck before he sobered up. But Allways could not have foreseen that Heyden would get drunk eighteen days later (after repairs were delayed and he lost his job) and drive his vehicle into Walters' vehicle.

Editorial take:

- Perhaps the Court would have ruled differently if there was evidence that Allways knew the extent of Heyden's alcoholism.

Starwood Management, LLC v. Swaim,
(September 29, 2017).

Quick and dirty statement of facts:

- The DEA seized several airplanes from Starwood Management, a charter aircraft company. Starwood hired attorney Swaim to attempt to recover one of the planes.
- A plaintiff can pursue recovery in both federal court

and the DEA Forfeiture Counsel. Swaim pursued both. Unfortunately, Swaim failed to satisfy a pre-suit notice requirement. The case was dismissed.

- Swaim unsuccessfully petitioned the DEA.
- Starwood hired attorney George Crow to assist with the remaining six seizures. Crow satisfied the notice requirement and successfully recovered the planes.
- Starwood sued Swaim and his law firm for legal malpractice and breach of fiduciary duty in connection with the loss of the plane.
- Swaim moved for summary judgment. Starwood responded with affidavits from Crow and another attorney. Among other things, Crow opined that "had Swaim, faced with the same set of facts, properly file[d] the verified claim with the DEA Forfeiture Counsel . . . , then the aircraft would have been returned in the same manner as the five that had been recovered so far. Thus, Crow opined that Swaim's negligent failure to comply with the notice requirements caused the forfeiture." (internal quotations omitted).

Appellate procedural posture:

- The trial court granted summary judgment in favor of Swaim—disregarding the expert affidavits.
- The court of appeals affirmed, holding one of the affidavits conclusory because it made "no case-by-case comparison of the facts in other aircraft seizure cases with the facts that are the subject of this case." (internal quotations omitted).

Issue:

- Whether an expert witness affidavit is conclusory regarding causation.

Holdings:

- The relevant question when addressing the adequacy of expert opinion affidavits in legal malpractice cases is "'Why': Why did the expert reach that particular opinion?" To demonstrate "why," the affidavit must explain the link between the facts the expert relied upon and the opinion reached.
- Crow ultimately concluded that had Swaim complied with the notice provisions required in federal court proceedings, Starwood would have recovered its aircraft. So the inquiry becomes why did Crow come to that conclusion? The basis for the conclusion was that Crow followed the prescribed methodology six times and had a perfect track record on the five cases disposed of as of the time the trial court granted summary judgment. The facts he relied on are both *demonstrable* and *reasonable*. They are demonstrable—as set out in his affidavit, he followed the method he said Swaim should have followed, and recovered the aircraft in five of the cases. The other case remained pending at the time he executed his affidavit. And his reliance on the high rate of success resulting from his compliance with the DEA's procedures to reach that conclusion is reasonable.Swaim raised several additional arguments with the affidavits—each of which the Court disagreed with—including:

- The Crow affidavit says nothing more than "Take my word for it, I know," and is thus a conclusory *ipse dixit*.
- Crow's affidavit is conclusory because it neither addressed Gonzalez's failure to testify nor reasons why her testimony would not be necessary in this case.
- Crow's opinion that the DEA's case was probably weak renders the affidavit conclusory.
- The Crow affidavit should have addressed differences and similarities between the seizure in this case and the other seizures such as differences in the registered owners, the planes' values, and the jurisdictions of registration.
- Crow's affidavit is conclusory because it does not address certain reasons why Starwood could not have prevailed if the DEA had chosen to aggressively pursue the case in federal court.

Editorial take:

- When representing a plaintiff in a legal malpractice case, counsel can ensure that an expert affidavit on causation is not conclusory by explaining how and why the negligence caused the injury. The expert's opinion needs to set out a demonstrable and reasoned basis for the opinion.